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IN THE

Supreme Court of the United States

October Term, 1975

NO. 75-1518

PEPI, INC., PHILIPS ELECTRONIC INSTRUMENTS, INC. and NORTH AMERICAN PHILIPS CORPORATION,
Petitioners

v.

ARTHUR H. PITCHFORD and PITCHFORD SCIENTIFIC INSTRUMENTS CORPORATION,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals for the Third Circuit does not yet appear in the Federal Reporter but is reported in 1975-2 Trade Cases ¶60,653 and in Appendix A of the Petition. No opinion was filed by the District Court.

Statutory Provisions Involved.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether there is any evidence, viewed in light of the presumptions and inferences to be accorded a prevailing party, to support the finding of the Court of Appeals for the Third Circuit that territorial restrictions upon resale caused damage to Pitchford Scientific.

2. Whether a manufacturer's distribution system imposing territorial restrictions upon resale, coupled with price fixing, is to be tested by a *per se* standard or the rule of reason.

STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE, TITLE 15

§1, SHERMAN ACT

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal.

COUNTERSTATEMENT OF THE CASE

In 1945, Arthur H. Pitchford was appointed the first dealer for Philips products in the United States. (R. 773a).[1] In 1960, the business was incorporated under the name of Pitchford Scientific Instruments Corporation and continued to purchase and resell Philips scientific, analytical and industrial x-ray equipment under a series of annual contracts with Philips Electronic Instruments (PEI), a division of Pepi, Inc. (R. 794a).

As a dealer, Pitchford Scientific took title to and assumed risk, dominion and control over the products it purchased from PEI for resale to its customers, the ultimate users. (R. 378a, 780a, 782a-783a, 2125a, 2385a). Products were not sold on a consignment basis. Risk remained with the dealer. (R. 782a-783a, 2386a).

In disregard of the seller-purchaser relationship between the parties, PEI by explicit contractual provision, restricted the territory in which and the customers to whom Pitchford Scientific could resell the products. (Complaint Exs. A, B, R. 363a, 3518a, 3520a). PEI firmly and resolutely enforced its policy of territorial restriction and refused to permit Pitchford Scientific to sell outside of its assigned territory in spite of numerous requests. (R. 2282a, 2906a, 3053a). Although fully capable of making sales in an expanded territory (R. 2901a-2902a), Pitchford Scientific complied with PEI policy by remaining in its territory and referring out-of-territory customers to the dealer or PEI branch in which the customer was located. (R. 626a-634a, 653a-658a, 894a, 905a, 2910a-2911a).

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1. Record references are to the Appendix filed with the Court of Appeals and cited R.....a. References to the opinion of the Court of Appeals are cited as Opinion, ...a.

Counterstatement of the Case.

The territory assigned to Pitchford Scientific was, for most product lines, completely surrounded by PEI branch outlets selling at the same level of distribution. (Ex. A, 628a, 3529a-3590a). It was for the benefit of those branch outlets that PEI imposed territorial restrictions and fixed the prices at which Pitchford Scientific could resell Philips products. (Ex. F, R. 1027a, 3599a, 412a-414a, 636a-638a, 660a-661a, 813a-821a).

By letter dated August 6, 1970, PEI terminated Pitchford Scientific's dealership for the resale of Philips products effective September 10, 1970. (Opinion, 3a.).

After an extended trial, the jury made specific findings on special interrogatories that PEI engaged in illegal territorial restrictions, price fixing, full line forcing and exclusive dealing (R. 110a-111a) and judgment was entered accordingly. The Court of Appeals for the Third Circuit, after a review of all the evidence, affirmed the jury's findings that PEI had established and enforced a policy of price fixing. (Opinion, 7a-10a). It further found sufficient evidence to support the jury verdict that PEI illegally restricted the territory in which Pitchford Scientific could resell Philips products and that this policy injured Pitchford Scientific during the relevant four-year period. (Opinion, 15a-23a). PEI's contentions that such restrictions were necessary because of the "hazardous nature" of the equipment, the introduction of new technology and the necessity for service and installation were specifically rejected because PEI, although given the opportunity, presented no evidence on any of these issues. (Opinion, 20a-21a).

REASONS FOR DENYING THE WRIT

The petition filed in this case is totally without merit. It fails to recognize the clear evidence upon which the jury rendered its verdict and upon which the Court of Appeals for the Third Circuit based its opinion and judgment. The decision below is clearly correct. The petition raises no conflict with the decisions of this Court or other Court of Appeals, nor does it present any important question of federal law.

The main thrust of PEI's first contention is that plaintiffs failed to produce any evidence of ". . . an active, sustained and real effort to enter the new market." (Petition, p. 10). In so presenting the question, PEI has attempted to convey the impression that the "new" market set forth in the damage proof is separate and distinct, of a quality different from the territory in which Pitchford Scientific was permitted to sell. This is not the case. The territory set forth in the damage proof only slightly expands the existing territory. (R. 1497a-1499a).

The result sought by PEI can be reached only by a studied disregard of the evidence.

Pitchford Scientific actively desired to expand its sales territory. Defendant's own witness, Robert Cavanagh, Vice President of North American Philips Corporation (R. 3027a), conceded that:

> In my conversations with Mr. Pitchford over the years he always wanted to have much, much greater coverage all over. . . . (R. 3053a).

All three of PEI's principal witnesses admitted that Pitchford sought, and PEI denied, permission to solicit

orders in the territory beyond that assigned in the contracts. (R. 2282a, 2906a, 3053a).

Pitchford Scientific had the capability to sell and service in a larger territory. At PEI's specific request, it had installed PEI equipment in Colorado, New York and Ghana, Africa. (R. 2901a). Defendants' witnesses conceded that Pitchford Scientific could have easily sold and serviced in Ohio, Virginia, New York and beyond. (R. 2901a-2902a).

The territory to which Pitchford Scientific was restricted was comprised of approximately one-half of Pennsylvania, all of West Virginia and four named Maryland counties. (Complaint Exs. A, B, R. 363a, 3518a, 3520a). Pitchford's main offices were located in Pittsburgh, Pennsylvania, although it did maintain a branch office in Harrisburg, Pennsylvania. (R. 897a). It requested of PEI the right to open a sales office in Buffalo, New York, which permission was denied. (R. 3053a-3054a). Only a basic comprehension of the relevant geography is required to show that had Pitchford been permitted to range as far North, East and West as it was permitted South (to the West Virginia-Kentucky border), it could have easily solicited orders in New York, Eastern Pennsylvania, Maryland, Washington, D.C., Virginia and Ohio. Had it been permitted to set up branch offices a much larger territory would have been available.

The solicitation of orders in this expanded territory would not have required significant additional staff, capital or other expense. The Pitchford Scientific sales and service staff was competent to handle a much greater territory. This becomes apparent upon con-

sideration of the fact that PEI, after terminating Pitchford Scientific, substantially increased the Pitchford Scientific territory to include Washington, D.C. and parts of Ohio. (R. 1608a). What had been the Pitchford territory was staffed by PEI with but one salesman and one serviceman. (R. 1613a, 1605a). By contrast, the Pitchford sales and service staff was significantly larger. (R. 1110a-1129a). And PEI's own witnesses conceded that service was never a restrictive factor in terms of how large an area a dealer could cover (R. 2900a), for a dealer could sell without assuming the obligation to service (R. 2898a).

Pitchford Scientific clearly lost sales during the damage period as a result of PEI's territorial restrictions. Both Mrs. Roskam and Mrs. Surma, who were employed during the relevant period, testified as to the numerous requests for quotes which were regularly received from outside the territory. (R. 629a-630a, 653a, 659a-660a). Pitchford Scientific, in compliance with PEI policy, refused to quote on these prospects and referred them on to the dealer in whose territory they were located. (R. 629a-630a, 653a, 659a-660a). Documentary evidence of these instances *during the damage period* was introduced at trial. (Ex. 21B, R. 651a, 3836a, Ex. 21C, R. 651a, 3837a).

Based on this evidence, there can be no question that Pitchford Scientific, during the damage period, was constantly engaged in an active, sustained and real effort to expand its territorial boundaries and that it suffered damage as a result of not being permitted to do so. There is no conflict between the decision of the Court of Appeals for the Third Circuit and this Court or any other Court of Appeals. Although the standards set forth in

the cases cited by PEI (Petition, p. 10-12) have been fully met, it should be noted that in general these cases involve entirely different factual situations. In large measure, the cases setting forth a requirement of a positive showing of desire to enter a new market involve manufacturers embarking on distinctly new ventures and not distributors seeking to sell the same product in a slightly larger territory. For example, in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), Zenith had never made any modifications to its domestic television set which utilized FM transmission to permit it to be used in the English market, which utilized only AM signals. Zenith's product was not saleable in the English market. To enter the market, it had to produce either a differently equipped set or convert its standard receivers. It did neither. *Id.* at 127. A review of the other cases cited by PEI reveal similar factual situations which are completely inapposite to the case at issue.

PEI's present position that this distribution system be tested by the "rule of reason" and not a *per se* standard is absolutely devoid of factual and legal basis. PEI was both the manufacturer and retailer selling at the same level of distribution as Pitchford Scientific. The Pitchford Scientific territory was surrounded by PEI branch offices. (Ex. A, R. 628a, 3530a-3533a). It was for the benefit of those branch offices that the territorial limitations were imposed. Such violations are without question governed by a *per se* standard. *United States v. Topco Associates, Inc.*, 405 U.S. 597, 608 (1972). A *per se* standard must again be imposed where a manufacturer seeks to police a division of markets for the benefit of horizontal competitors. *United States v. Topco Associates, Inc., supra; American Motor*

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Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (3d Cir. 1975).

The horizontal nature of these particular restraints was understood by the district court, the jury and the Court of Appeals for the Third Circuit. (Opinion, 20a).

However, even assuming *arguendo* that this system must be tested under a purely vertical standard, Pitchford Scientific must prevail. PEI products were sold to dealers for resale to the public. (R. 378a, 780a, 783a, 2125a). They belonged to the dealer when they left PEI's plant. (R. 2385a). The dealer collected from the customer and was obligated to pay PEI whether or not the customer paid him. (R. 782a, 2386a). PEI was so concerned about this that it required Mr. Pitchford to give his personal guarantee for the obligations of Pitchford Scientific (R. 2358a). Further, a review of the testimony and the records introduced into evidence clearly show that on numerous occasions orders were booked in the name of Pitchford Scientific and sent directly to it, not the customer. (R. 783a, Exs. 23N, 230, R. 1501a, 4024a-4029a, 4032a-4035a). Thus, attempts to equate this system with the consignment arrangement in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) must fail.

But PEI's contentions must be dismissed for another, more obvious factor. Both the jury and the Court of Appeals found price fixing to be an integral part of the distribution of PEI products. (Opinion, 8a). Where such is the case, *United States v. Arnold, Schwinn & Co., supra*, holds a *per se* violation is established.

> Nor is this a case of territorial or dealer restrictions accompanied by price fixing . . . . [I]f there were

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> here a finding that the restrictions were part of a scheme involving unlawful price fixing, the result would be a *per se* violation of the Sherman Act. *Id.* at 373.

This factor is specifically recognized in *Colorado Pump & Supply Co., v. Febco, Inc.*, 472 F.2d 637 (9th Cir.), *cert. denied*, 411 U.S. 987 (1973), one of the cases upon which PEI relies. In addition, *Colorado Pump, supra,* does not apply where explicit contractual restrictions and restrictions as to whom and at what price the dealer may resell, are present. Both are present in PEI's marketing scheme. (Complaint Ex. A, R. 363a, 3518a).

PEI had at trial every opportunity to advance its current position that territorial restrictions were required because of the hazardous nature of x-rays and the needs for installation and service. It failed to introduce evidence to support these positions because no such evidence existed.

The only evidence offered as to the hazardous nature of the equipment was that it is controlled by various state and local laws and regulations. PEI cannot seriously maintain that Pitchford Scientific personnel could not have acquainted themselves with the laws of any state in which they were permitted to sell. Neither can it maintain that Pitchford Scientific, although fully conversant with all x-ray requirements for Pennsylvania and Maryland, should be restricted from making sales in Eastern Pennsylvania and all but four counties in Maryland. Interestingly, PEI never felt this to be a significant problem when it requested Pitchford Scientific to install PEI equipment in Colorado, New York and Ghana, Africa. (R. 900a-901a, 2901a).

In fact, PEI's own witness conceded that sales could be made without the dealer being required to install and service the equipment (R. 2898a), and that service was never a factor in terms of how large a territory a dealer could cover. (R. 2900a). These were not sales to the retail public, but to knowledgeable, skilled and highly trained individuals in industry, science and medicine, many of whom serviced and maintained PEI equipment on their own. (R. 2920a). *Tripoli Co. v. Wella Corp.*, 425 F.2d 932 (3d Cir. 1970) is inapposite.

Similarly, PEI did not, because it could not, bring itself without the exception of a newcomer breaking into the market. Its attempts to raise these contentions in light of the absolute failure to introduce any evidence to that effect must fail. Thus, it is absolutely clear in light of the evidence and the law that the decision below is correct. PEI's failure to prevail on these issues is a direct result of its failure to produce any evidence at trial to support its position. (Opinion, 20a-21a). The Court of Appeals for the Third Circuit specifically considered and rejected each and every argument now being pressed by petitioners.

CONCLUSION

Petitioners' Petition for a Writ of Certiorari raises no conflict of decision or important question of federal law which calls for a determination by the Supreme Court of the United States. Therefore, this Court must deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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